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## Divergent Interests: Union Representation of Individual Employment Discrimination Claims

DEBORAH A. WIDISS\*

Professor Michael Green's contribution to this symposium, "Reading *Ricci* and *Pyett* to Provide Racial Justice Through Union Arbitration,"<sup>1</sup> is a hearteningly optimistic assessment of the benefits offered by union arbitration of individual employee discrimination claims as recently permitted by *14 Penn Plaza LLC v. Pyett*.<sup>2</sup> Professor Green points out that numerous studies have found that employment discrimination plaintiffs typically fare poorly in the courts.<sup>3</sup> He argues persuasively that arbitration pursuant to a collective bargaining agreement could offer employees who assert they are victims of discrimination some significant benefits, including support in bringing a claim and the possibility of a racially-diverse cadre of arbitrators.<sup>4</sup> Other commentators, including other contributors to this symposium, suggest that the merits of arbitral forums relative to judicial forums are quite difficult to assess empirically and likely vary by context.<sup>5</sup> Even if we assume, however, that arbitration—if fully and aggressively pursued—can offer considerable benefits to individual employees, I think it is far more likely than Professor Green suggests that a union's duty to protect and advance the collective interests of all of its members will come into conflict with the particular interests of an employee asserting a discrimination claim. Professor Green celebrates the possibility that the interests of unions and employees can converge. My fear is that often, even for unions acting in good faith, the interests of unions and individual employees will diverge—and that individual employees who are victims of discrimination will be the losers.

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\* Associate Professor, Indiana University Maurer School of Law. I thank Michael Green for his thought-provoking contribution to this symposium; it was a pleasure and an honor to comment on his article. I am also grateful to Ken Dau-Schmidt for inviting me to take part in this symposium and for giving me helpful suggestions on an earlier draft. Thanks as well to other participants in the conference for their feedback and to the editors of the *Indiana Law Journal* for their conscientious work.

1. Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367 (2012).

2. 129 S. Ct. 1456 (2009).

3. See Green, *supra* note 1, at 406 n.213. It is important to note, however, that it is difficult for these studies to assess the significance of claims that might potentially have been successful but are resolved by settlement.

4. See *id.* at 399, 412–13. Professor Green's analysis focuses specifically on the potential benefits for employees seeking to vindicate claims of race discrimination. Although some of the benefits he identifies may be particularly salient in the racial context, the Court's holding in *Pyett* concerned age discrimination claims and is likely to be applied to all statutorily-guaranteed civil rights. Accordingly, my analysis of the risks posed by these new developments considers not only race but also other protected criteria.

5. Compare David Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012), with Zev J. Eigen, Nicholas F. Menillo & David Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment & Implement a 'Mandatory Arbitration Act'*, 87 IND. L.J. 271 (2012).

In *Pyett*, the Court, in a 5-4 decision, held that courts may enforce provisions in collective bargaining agreements that commit to mandatory arbitration of an individual employee's claim that an employer has violated statutory prohibitions on employment discrimination.<sup>6</sup> In earlier cases, the Supreme Court had recognized a potential conflict between individual interests and union interests in the pursuit of employment discrimination claims.<sup>7</sup> In *Pyett*, the employees seeking to bring their statutory claims in court argued that this tension precluded enforcing waivers found in collective bargaining agreements; numerous amicus briefs advanced similar arguments.<sup>8</sup> Somewhat surprisingly, and rather tellingly, even the National Academy of Arbitrators argued against expanding the scope of claims that could be subject to arbitration on the ground that the risk of divergent interests was simply too high to enforce a waiver of a judicial forum.<sup>9</sup> The Academy explained that although it might "appear odd that an association of professional labor arbitrators [was] advancing a position that would restrict the role of labor arbitration," this position was compelled by the Academy's educational mission to "bring to bear its experience and considered judgment to the question of what best comports with the nation's system of industrial self-government and of how individual civil rights in employment are best protected."<sup>10</sup> In *Pyett*, the majority opinion rejects these concerns, arguing that the labor relations framework anticipates subordination of individual desires to the collective good and that these arguments therefore amount to a "collateral attack on the NLRA [National Labor Relations Act]."<sup>11</sup>

The Court's cavalier dismissal of potential conflicts is unwarranted. First, there is a real danger that union leaders may themselves hold discriminatory bias and accordingly fail to support individual employees adequately in the grievance and arbitration process; although a union, like an employer, is prohibited from discriminating, it may be quite difficult for an employee to prove a union's actions

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6. See *Pyett*, 129 S. Ct. at 1474.

7. See, e.g., *McDonald v. City of Westbranch*, 466 U.S. 284, 291 (1984) ("The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee."); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1973) ("In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is being made." (citation omitted)).

8. See, e.g., Brief for Respondents at 20-30, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581); Brief of *Amici Curiae* Lawyers' Comm. for Civil Rights Under Law et al. in Support of Respondents at 12-19, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581); Brief of the AFL et al. as *Amici Curiae* in Support of Respondents at 12-15, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581).

9. See Brief *Amicus Curiae* of Nat'l Acad. of Arbitrators in Support of Respondents at 7, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (No. 07-581).

10. *Id.* at 3.

11. 129 S. Ct. at 1460. The Court also argues that it is a "judicial policy concern" that cannot be a "source of authority for introducing a qualification into the ADEA that is not found in its text." *Id.* at 1472. I believe that this argument should fail, largely for reasons set forth in the dissenting opinion. See *id.* at 1480-81 (Souter, J., dissenting).

were motivated by discriminatory animus. But the more subtle—and probably more significant—problem with the Court’s analysis is that it fails to recognize that protections from employment discrimination are different from other subjects of collective bargaining because of two intertwined factors: they are rights guaranteed by statute rather than benefits secured by the union for its membership through the collective bargaining process, and they are likely to be valued significantly more highly by a discrete minority of union members than by the majority. As discussed more fully below, since maximizing benefits to the collective membership is the paramount duty of unions, a union, acting entirely in good faith, might bargain away the right to litigate employment discrimination claims in court in return for an employer concession that is valued more highly by the membership as a whole. Additionally, for related reasons, union leadership may value pursuing antidiscrimination claims less highly than other potential grievances. Moreover, employment discrimination claims often place the interests of employees in conflict; unions will face difficult choices when supporting one member’s claims will directly disadvantage other members. The limited protections offered by a union’s “duty of fair representation,” at least as that standard has been traditionally understood, may well be inadequate to protect individual employees who allege they have been subject to employment discrimination.<sup>12</sup>

It is particularly important to articulate more concretely the specific ways in which union and employee interests can diverge because the majority in *Pyett* declined to decide whether a mandatory arbitration clause would be enforceable even if the union controls access to and presentation of employees’ claims in the arbitration process.<sup>13</sup> Professor Green states that he agrees with lower courts that have held, even after *Pyett*, that waivers should not be enforceable in this scenario.<sup>14</sup> I do too. But it is certainly plausible that the Supreme Court’s reasoning in *Pyett* could be extended to enforce such agreements on the grounds that an employee’s right to sue her union for failing to meet its duty of fair representation offers sufficient insurance against actions by the union that could compromise her interests.<sup>15</sup> This would be inaccurate and unfair, dramatically increasing the risk that an employee’s legislatively-granted right to be free from discrimination would be undermined.

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12. See, e.g., Lea S. VanderVelde, *A Fair Process Model for the Union’s Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983) (discussing judicial development of the duty of fair representation and arguing that it will often be inadequate to protect individual employees).

13. See *Pyett*, 129 S. Ct. at 1474 (explicitly reserving this question).

14. See Green, *supra* note 1, at 393–95 (collecting cases and discussing policy concerns).

15. The *Pyett* majority asserts that arbitral forums are fully adequate substitutes for litigation forums, 129 S. Ct. at 1471, and dismisses concerns about potential conflict of interests by suggesting that the opportunity to bring a “duty of fair representation” suit or antidiscrimination suit against the union provides adequate protection for the employee if the union fails to represent his or her interests. *Id.* at 1473. This reasoning could be extended to hold that employees can be expected to rely on these remedies if the union fails to pursue arbitration at all.

## I. “BAD FAITH” UNION DISCRIMINATION

Professor Green argues that individual employees could benefit from having the expertise and support of a union in pursuing discrimination claims.<sup>16</sup> This will undoubtedly be true in many instances. However, discrimination in the workplace—by unions as well as by employers—remains real and common.<sup>17</sup> Thus, it is important to recognize that permitting unions to agree to waive their employees’ right to litigate employment discrimination claims in court raises the possibility that union leaders could consciously discriminate against individual employees by failing to support them adequately in pursuing a grievance or arbitration. Clear proof of discriminatory animus on the part of the union would violate a union’s duty of fair representation.<sup>18</sup> But the Supreme Court has set the bar quite high to ensure that a union retains significant discretion, stating that to prove a union was discriminatory in its exercise of judgment a plaintiff must “adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.”<sup>19</sup> In the absence of such clear evidence, the deferential standard typically used to assess union actions in fair representation suits—for example, union negligence is insufficient to make out a claim<sup>20</sup>—would make it relatively easy to hide at least some illicit motives. Professor Green recognizes this risk, but avers that decreasing union density and the increasing diversity of the workforce in general means that “unions have emphasized racial justice.”<sup>21</sup> Although this may well be correct, history suggests that it is all but certain that some employees will be subject to discrimination first by their

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16. See Green, *supra* note 1, at 399.

17. The examples of harassment, much of it by coworkers rather than supervisors, detailed by Professors Angela Onwuachi-Willig and Mario Barnes in their contribution to this symposium provide striking examples of the ongoing pervasiveness of discriminatory attitudes. See Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of “Obama” in Anti-Discrimination Law*, 87 IND. L.J. 325 (2012).

18. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 46 (1957) (failure to help employees with grievances because they were black would be a “manifest breach of the Union’s statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit”); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (the “statutory obligation to represent all members of an appropriate unit requires [unions] to make an honest effort to serve the interests of all of those members, without hostility to any”); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944) (union is required “to represent . . . minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith”).

19. *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971); see also *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (“A breach of the statutory duty of fair representation occurs *only when* a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” (emphasis added)).

20. See *Steamfitters Local Union No. 342*, 336 N.L.R.B. 549, 549 (2001).

21. See Green, *supra* note 1, at 405.

employers and then face further discrimination by their unions when they attempt to seek recourse.<sup>22</sup>

## II. “GOOD FAITH” CONTRACT NEGOTIATION

The second significant risk of divergent interests stems from a recognition that the value ascribed to robust enforcement of antidiscrimination mandates is likely to vary dramatically among union membership. Ex ante, at the point when a union negotiates an arbitration clause relating to employment discrimination claims, it may be impossible to know which specific employee in a union will seek to enforce such rights, but it is quite easy to predict which groups of employees are more likely to do so: racial, religious, or ethnic minorities, women, individuals with disabilities, and older workers.<sup>23</sup> Individual members of a union (for example, a woman in predominantly male workplace; a black in a predominantly white workplace; a Muslim in a predominantly Christian workplace) might highly value the right to litigate an employment discrimination claim, but they may be unable to convince their fellow union members that preserving this right should be a priority. Now that *Pyett* permits a union to agree to a waiver of the right to litigate employment discrimination claims, employers may well seek this right during negotiations, and unions may well be willing to trade this right for other substantive benefits more highly valued by the collective.

Of course, there can be variation in how union members value other conditions of employment that have long been subject to collective bargaining. An employee

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22. Prior to *Pyett*, unions did not typically pursue statutory employment discrimination claims on behalf of their members. However, in other contexts, it is well-recognized that unions sometimes discriminate against members in failing to pursue grievances. *See, e.g., Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874 (9th Cir. 2007) (affirming district court’s decision that union discriminated on the basis of sex by failing to provide the same quality of representation to female employee as it did to similarly situated male employees); *Young-Smith v. Bayer Health Care, LLC*, No. 3:07 CV 629, 2011 WL 836758 (N.D. Ind. Mar. 3, 2011) (genuine issue of material fact regarding whether union discriminated on the basis of race in failing to process employee’s grievance); *Hubbell v. World Kitchen, LLC*, 717 F. Supp. 2d 494 (W.D. Pa. 2010) (genuine issue of material fact regarding whether union discriminated on the basis of sex in failing to contest employee’s suspension). There are many more cases in which an employee alleges discrimination on the part of the union but the claim is dismissed. *See, e.g., Beachum v. AWISCO N.Y.*, No. 09 Civ. 7399(RJS), 2011 WL 1045082 (S.D.N.Y. Mar. 16, 2011) (dismissing employee’s discrimination claim against union). Undoubtedly, in some instances, the union really has *not* engaged in any discrimination. In others, however, the union may have in fact discriminated but the plaintiff may lack evidence to prove it.

23. In some respects, this is a given, in that only individuals over forty may bring a federal age discrimination claim, 29 U.S.C. § 631(a) (2006), and generally only individuals who either have or are regarded as having a disability may bring a claim under the Americans with Disabilities Act, 42 U.S.C. §§ 12102, 12112 (Supp. III 2010). Under Title VII, by contrast, so-called “reverse” discrimination claims are possible (the plaintiffs in *Ricci* were white men), but these are relatively unusual. *See, e.g., Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999) (discussing proof structures applied to reverse racial discrimination claims).

who is relatively young and healthy, for example, might happily give up comprehensive health insurance benefits for increased wages, and a union, serving the needs of its collective membership, might subordinate that desire to the majority will. But an individual employee's right to be free from discrimination, and to go to court to enforce that right, is not a benefit secured for the employee through the union's negotiation. Rather, the right to be free from discrimination stems from legislative mandates, and they are specifically designed to protect minority interests.<sup>24</sup> The right to be free from discrimination thus differs dramatically from other subjects of bargaining, such as health insurance, pensions, termination standards, or wage rates (at least any wage rate above statutorily-enforced minimum wages),<sup>25</sup> where a union through the strength of collective bargaining obtains benefits for its members beyond those required by statute. In these other contexts, it is reasonable to enforce, in a workplace where a majority of eligible employees have chosen to form a union, a tradeoff between the benefits that a union can secure for its membership and the individual liberty of employees. Although not every union member is pleased with the deal that a union strikes on his or her behalf, labor relations law takes away from those employees only the speculative potential that they could have made a better deal negotiating on their own. By contrast, if a union agrees to a mandatory arbitration clause covering employment discrimination claims, the individual employee loses something that a legislative body, rather than the union, has secured for her—that is, the right to pursue such a claim in court.

The fact that, prior to *Pyett*, the Supreme Court had held that an individual employee in an individual employment contract could commit to arbitrate statutory discrimination claims does not change this analysis.<sup>26</sup> In that instance, at least as a formal matter, the individual employee is making her own assessment of the relative merits and costs of this bargain. This may seem to be a distinction without a real difference, since in practice, employers often insist that prospective employees agree to such waivers as non-negotiable conditions of employment—indeed, unions are probably far more likely than individuals to be able to refuse to accept mandatory arbitration clauses precisely because of their collective bargaining strength. But notably, when an employee agrees to (or even is coerced to accept) an individual employment contract with a mandatory arbitration clause, she will control decisions regarding any grievance or arbitration action that she seeks to bring—meaning she does not risk the possibility that the union could, either in “bad faith” (as described in Part I) or in “good faith” (as described in Part III), make choices that would undermine her claim to serve the interests of other members.

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24. See, e.g., Civil Rights of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17 (2006) (prohibiting discrimination on the basis of race, color, sex, religion, and national origin); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634; Americans with Disabilities Act, 42 U.S.C. § 12111–12117.

25. See Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

26. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

## III. “GOOD FAITH” UNION DECISIONS REGARDING GRIEVANCES AND ARBITRATION

A union that agrees to a *Pyett*-style waiver will also face divergent interests when it needs to make decisions regarding whether and how it will proceed with a potential discrimination claim by one of its members. The union must weigh the costs of bringing a grievance or arbitration proceeding—including not only the direct costs, such as time spent by a union representative or attorney, but also indirect costs, such as the impact of bringing a grievance on the relationship between the union and the employer—against the benefits to its collective membership. This is true for all grievances; indeed, traditionally a union has been able to decline to pursue even a likely meritorious claim in arbitration without violating its duty of fair representation.<sup>27</sup>

But the differential value ascribed to robust enforcement of antidiscrimination mandates makes these claims somewhat different from other issues traditionally subject to collective bargaining. If a union grieves or arbitrates a claim, for example, that an employer has failed to comply with a progressive discipline procedure as set forth in a CBA, winning the claim will tend to help all members, in that it signals clearly that the union will hold the employer to its promises. Although most employees may never be subject to discipline, it is relatively easy for all members to see they benefit by ensuring that the employer complies with a discipline procedure. This may be far less true for employment discrimination claims. Many employees know, with almost certainty, that they will never seek to bring such a claim and in fact may perceive enforcement of antidiscrimination measures as counter to their own interests. Accordingly, there is reason to fear that at least some unions would value pursuing, and even winning, antidiscrimination claims significantly less than other potential grievances; this might reasonably represent the collective interests of union membership but deprive individual employees of a right to vindicate their statutory rights. Moreover, union decision makers and other union members may unfairly discount the viability or appropriateness of bringing a discrimination claim. Empirical studies show that, absent explicitly discriminatory comments or other “direct” evidence of animus, “insiders” (for example, whites or men) are far less likely than “outsiders” (for example, racial minorities or women) to perceive negative incidents as stemming from discriminatory bias.<sup>28</sup>

There is a risk beyond these general concerns regarding cost-benefit analysis. Frequently, efforts by a union to prove a member had been a victim of discrimination could directly harm other union members. Professor Green suggests that in any situation in which a complaint “pits one member against another,” the union should avoid “picking sides” but should instead work productively to try to involve all relevant employees in finding a fair solution.<sup>29</sup> The problem is that the waivers permitted by *Pyett* dramatically increases the risk that a union will be in a position to pick sides; a future decision that holds collectively-bargained waivers

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27. See, e.g., *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728 (1981).

28. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

29. See Green, *supra* note 1, at 398.



are enforceable even if a union controls access to and presentation of an employee's claims in arbitration would make this problem even worse.

For example, consider *Ricci v. DeStafano*.<sup>30</sup> As Professor Green explains in more detail, the issue in *Ricci* was whether the New Haven Fire Department should certify results of a test designed for use in promotion after it learned that the pass rates for blacks and Hispanics were much lower than for whites.<sup>31</sup> The department declined to certify the test, over the objections of many of the firefighters, on the grounds that it would likely give rise to a disparate impact lawsuit.<sup>32</sup> But imagine the New Haven local had signed a collective bargaining agreement that, like the collective bargaining agreement in *Pyett*,<sup>33</sup> stipulated all claims of discrimination were subject to arbitration. The union would then have to decide whether to file a grievance on behalf of the white firefighters claiming that failure to certify the test was discriminatory, and thus clearly work against the interests of at least some African American members of the union, or decline to file such a grievance, and thus clearly work against the interests of at least some white members of the union. This latter choice would open the union up to a claim by the white employees that the union had failed in its duty of fair representation and (at least if a future decision enforces such agreements even if the union declines to pursue a claim) leave the white employees without a means to pursue a claim of discrimination unless they could win a hybrid suit against the union.<sup>34</sup> Note, too, that if the city had instead chosen to certify the test, then the union would have faced the opposite question. That is, the union would have to choose whether to file a grievance on behalf of black firefighters claiming that certifying the test was discriminatory in that it caused an unlawful disparate impact, and thus clearly work against the interests of at least some white members of the union, or decline to file such a grievance, working against the interest of at least some black members of the

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30. 129 S. Ct. 2658 (2009).

31. See Green, *supra* note 1, at 388–90.

32. See *Ricci*, 129 S. Ct. at 2667–71.

33. See *Pyett*, 129 S. Ct. at 1461.

34. Professor Green suggests that a union could provide resources for an employee to obtain legal counsel without actually taking a position in the dispute. See Green, *supra* note 1, at 397 n.165. This could mitigate the problem to some extent, but even this action is “taking sides” at the level of determining that the claim merits committing the union’s resources to provide private counsel but does not merit the union itself supporting the grievance. A union could also choose to provide neutral representation for both groups of employees. This is less obviously picking sides, but even here the union would need to determine that each set of claims has sufficient potential merit that it can legitimately use its resources to support them both but also that neither claim merits the union’s involvement as an advocate; given limited union resources, it also is probably unlikely that unions would frequently avail themselves of this possibility. Professor Green in fact invites a union to “pick sides in the dispute if it clearly investigates the matter.” *Id.* at 398. My concern, as explained more fully in the text, is that tensions between a union’s duties to its collective membership and its duty to an individual member will often be more acute in the employment discrimination context than in most other potential grievance scenarios thus making it unclear how a union, with the best of intentions, could conduct a “fair” investigation. The possibility of discriminatory bias by union officials, see *infra* Part I, further compounds this problem.

union. Again, the latter choice would also expose the union to a claim that it failed in its duty of fair representation and leave the black employees without a means to pursue a claim of discrimination unless they could win a hybrid suit.

The divergent interests in *Ricci* are particularly graphic, but I do not believe that they are exceptional. Rather, as *Ricci* illustrates, because disparate impact claims seek to change policies that disproportionately disadvantage some employees, a successful claim will generally disadvantage other employees. The same is true of challenges to affirmative action policies.<sup>35</sup> Many reasonable accommodations for disabled individuals impose costs on the employer, which the employer in turn may seek to pass along to the employees more generally;<sup>36</sup> accommodations relating to job restructuring or transfers may directly implicate the responsibilities of other employees.<sup>37</sup> A failure to promote claim requires comparing the qualifications of the disappointed applicant to the successful applicant and claiming that in relevant respects the former is a better employee than that latter.<sup>38</sup> A claim that a union member is harassed by a co-worker will often require comparing conflicting accounts of the same incident, and a finding of harassment will typically result in discipline against the harasser, which itself might be challenged by the union.<sup>39</sup> And indeed, even in the *Pyett* case itself, the claim that some union members were reassigned responsibilities on the basis of age was a challenge to the appropriateness of assigning desirable responsibilities to other—younger—union members.<sup>40</sup>

The fact that so many different kinds of employment discrimination claims could give rise to conflicts is not surprising. By their very nature, employment discrimination claims are comparative, in that they seek to establish that an employer improperly differentiates among employees on the basis of race, color,

35. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (unionized employee challenged affirmative action program jointly developed by union and employer).

36. See, e.g., Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001); Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERK. J. EMP. & LAB. L. 111 (2003) (both developing models that seek to quantify redistribution effects). These and other theorists have also demonstrated that other antidiscrimination mandates, most notably disparate impact provisions, may likewise have such redistributional effects. See *id.*

37. See, e.g., *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) (disabled employee claimed that assignment to a vacant job, in violation of a seniority policy, should be a required reasonable accommodation). In this case, the Court held that generally a *bona fide* seniority system agreed upon in a collective bargaining agreement will trump a disabled individual's request for a transfer but left open the possibility that in some instances this could nonetheless be required. See *id.* at 403–06.

38. See, e.g., *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (comparing plaintiff's performance reviews and interview scores with those of a co-worker who was promoted).

39. *Compare Chrysler Motors Corp. v. Int'l Union Allied Indus. Workers of Am.*, 959 F.2d 685 (7th Cir. 1992) (upholding arbitration award reinstating grievant who was terminated for sexually assaulting a co-worker), with *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990) (vacating arbitrator's reinstatement of harasser as counter to public policy).

40. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1461–62 (2009).

national origin, sex, age, disability, or other prohibited criteria.<sup>41</sup> In most cases, an employee relies heavily on circumstantial evidence that seeks to show that she is, in relevant respects, as qualified or more qualified than another employee who is in some way preferred by the employer.<sup>42</sup> Thus, in all kinds of contexts, a union bringing a claim on behalf of one employee would be faced with gathering evidence, making arguments, or seeking settlements that are adverse to the interests of other employees.<sup>43</sup> These realities place unions in an untenable position, but it is one that the Supreme Court has thrust upon them.

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In *Pyett* the Supreme Court offers unions the option of agreeing to commit to arbitrate individual employment discrimination claims. After assessing the pros and cons of the deal, unions may decide that this is a “Pandora’s box” they are reluctant to open. In fact, unions probably have far greater negotiating strength to refuse to agree to mandatory arbitration than do individual employees. There is, however, at least the possibility that unions could nonetheless be forced to do so. Now that waivers are on the table, at least some employers will seek them in negotiation. Even if unions are resistant, an employer that reaches impasse on the point might seek simply to impose a mandatory arbitration clause. As Professor Green observes, the permissibility of this will also likely ultimately be decided by a future Supreme Court decision.<sup>44</sup> The reasoning in *Pyett* suggests that it may well be allowed. And so I wish I shared Professor Green’s optimism regarding the constructive potential of *Pyett* for union solidarity. I hope that the fears laid out above prove to be baseless. But in case they are not, those who care about robust enforcement of antidiscrimination mandates should monitor carefully the implementation of mandatory arbitration clauses and develop new conceptions of the union’s duty of fair representation to protect adequately individual employees’ right to be free from discrimination at work.

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41. See sources cited *supra* note 24.

42. See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (confirming that circumstantial evidence may be used even in claims asserting that a prohibited criteria was a motivating factor in a decision based on both legitimate and illegitimate grounds); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (collectively developing a burden-shifting framework used to assess the significance of circumstantial evidence in establishing that an employer’s proffered justification for a challenged action is pretextual); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

43. As Professor Green notes, similar issues may arise at times when a union grieves issues around promotion entitlements, see Green, *supra* note 1, at 398 n.166, or a termination as lacking “just cause.” This is true to some extent, but, notably, in a just cause termination the burden is on the employer rather than the union (or employee) to prove just cause exists. Thus, the union is not faced with the same obligation to affirmatively make a case on behalf of one employee by compiling evidence against other employees.

44. See Green, *supra* note 1, at 408–10.